80-1044

No.

IN THE SUPREME COURT OF THE
UNITED STATES

1980 Term

In re WILLIAM L. FISHER,
individually, and as
administrator of the
estate of Therese deL.
Fisher, deceased.

On Writ, alternatively, of Prohibition,
Mandamus, Superintending Control or
Common Law Certiorari to the United
States Court of Appeals for the Sixth
Circuit

PETITION FOR EXTRAORDINARY WRIT

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IN THE SUPREME COURT OF THE UNITED STATES

In re WILLIAM L. FISHER, individually, and as administrator of the estate of Therese deL. Fisher, deceased.

PETITION FOR EXTRAORDINARY WRIT

Now comes plaintiff-appellant (herein sometimes simply "plaintiff") and seeks issuance by this court of a writ authorized by 28 USC Sec 1651(a).

The writ sought is, alternatively, one of prohibition, mandamus, superintending control or common law certiorari.

The relief sought is not available in any other court because no other court stands higher that the United States Court of Appeals to which the writ sought should be directed.

All persons (herein simply "respondents") against whom relief is sought are as follows: U.S. Court of Appeals Judges Engel and Keith; U.S. District Court Judges Ballantine and Pratt and Omaha

Indemnity Company, a foreign insurer.

The relief sought cannot be had by statutory certiorari because there is no basis for federal jurisdiction in the court of first instance (Federal District Court for the Eastern District of Michigan).

If this court finds (contrary to the premise of the instant Petition) that the court of first instance has jurisdiction, then the writ of common law certiorari for which he prays should be adequate to review the record; otherwise, Petitioner prays that his instant Petition be treated as one for statutory certiorari.

The opinions of the courts below have not been reported.

The date of the judgment or order sought to be reviewed is August 26, 1980.

The date of the order denying rehearing en banc is October 14, 1980.

The statutory provision conferring

jurisdiction on this court to issue said extraordinary writ is 28 USC 1651(a).

The writ should issue, alternatively, to bring up the record for review, to quash the judgment, to remand the case to the state court from which it originated and where it exclusively belongs, to order respondent judges to undo what they have done or to prohibit them from any further action in the case.

The questions presented for review are:

I

Did respondent judges so far depart from accepted judicial standards as to require this court's supervision?

II

Did respondent judges act without jurisdiction by an illegal "case-grabbing" extension of diversity jurisdiction?

III

Was the removal petition in the

instant case so defective as to fail to confer jurisdiction upon the federal courts?

IV

Did respondent judges act without jurisdiction since in their minds the jurisdictional minimum amount in controversy was not shown with any legal certainty?

V

Must the decision of the Court of Appeals be reversed by reason of the absence on the record of an indispensible party?

VI

Did respondent judges, by proceeding "without deciding" the issue of subject matter jurisdiction, render their judgment a nullity?

VII

Did respondent judges decide an important federal question contrary to other circuits and which should be settled by this court?

VIII

Did respondent judges decide an important state question in such manifest disregard of state law as to require reversal of their judgment?

IX

Did respondent judges also err reversibly in deciding the other state questions raised in the proceedings below?

X

Is respondent insurer guilty of such inequitable conduct as should close the door to it to all judicial relief?

The parties to the proceedings in the Court of Appeals were Petitioner herein, as plaintiff-appellant, and Omaha Indemnity Company, a foreign insurer, as defendant-appellee.

The case involves the following statutes set out verbatim in the appendix:

Michigan statute
MCL 500.3009; MSA 24.13009

Federal statutes
28 USC 1332
28 USC 1446(d)

The following is a concise statement of the case containing facts material to consideration of the questions presented.

Exclusive jurisdiction of the instant case is in the state courts where it had its genesis as early as 1974.

A state (Michigan) court judgment was obtained against plaintiff's decedent, Therese Fisher, arising out of an automobile accident in which plaintiff's decedent was the driver of an automobile owned by a third party. Defendant insurer insured plaintiff's decedent under a family automobile policy as a permissive user of said automobile.

Garnishment proceedings (not removable to a federal court) were instituted against defendant insurer in a state court but said insurer obtained their dissolution on procedural grounds; in said garnishment proceedings said insurer filed a fraudulent garnishment disclosure hiding the fact that it was even such insurer.

Plaintiff, a citizen of Michigan, then instituted a direct action in the local county court (state court) against insurer to recover the judgment rendered against his decedent (as insured of said family automobile policy) and to pay the same over to the judgment creditor entitled thereto who has a judgment creditor's claim against the estate plaintiff is administering.[1]

Defendant insurer does insurance business in Michigan and has irrevocably

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[1]Plaintiff-appellant's inventory and continuing reports to the Oakland County Probate Court show the judgment as a claim against the estate and the instant cause of action as an asset of the estate as follows:

Receipts (Assets)
Claim against Omaha Indemnity Co. for breach of Family Automobile Liability Policy #315-24-9541-A1 .....Value Indeterminate.

Disbursements (Liabilities)
Claim of Richard Kolar against estate - Judgment of 52/3 District Court(Mich.).. ..... $1635.00 now worth (with interest) $2007.13.

appointed the Michigan Insurance Commissioner its agent for service of process; the aforesaid direct action in the state court was commenced by service of process upon the Michigan Insurance Commissioner. As a condition of doing insurance business in Michigan defendant insurer has the obligation, which it breached in the instant case, of vouchsafing that its liability insurance policies not deviate from the coverage mandated by law.

Insurer then filed a fraudulent removal petition under Section 1332 of Title 28 USC well knowing that its statement as to citizenship was false and that it was a citizen of Michigan.

The removal petition executed by defendant insurer aside form being fraudulent was so far defective as to fail to confer jurisdiction upon the federal courts since it was executed by a person

who had no official position with insurer as an officer or employee, was not possessed of the full facts, contradicted one of insurer's officers as to a critical jurisdictional averment and failed to identify or misidentified insurer's "principal place of business" so that the location thereof does not affirmatively appear from the record as required by 28 USC 1332.

Said removal petition was also fatally defective in not being accompanied by a valid bond as required by 28 USC 1446(d).

In its brief in the Court of Appeals, defendant insurer again falsified by saying:

> "Its policy contains no limitations respecting public liability because public liability is the coverage plaintiff purchased."

Then it went on to argue (dishonorably but successfully) to the Court of Appeals that an exclusion to public liability void under Michigan law relieved it of liability to plaintiff!

All of the aforesaid fraud of defendant insurer was indiscreetly overlooked by respondent judges' decision blessing insurer's cheating on its insurance policy in the instant case.

Argument in support of allowance of the writ sought is as follows:

QUESTION I

In their order of October 14, 1980 denying rehearing en banc, respondent judges so far departed from the accepted course of judicial proceedings as to require this court's supervisory control. Said court arrogantly proceeded "without deciding" the issue of subject matter jurisdiction.

In its very own words, the Court of Appeals' unbelievable statement is as follows:

> "In his petition (for rehearing en banc), the plaintiff asserts for the first time that the district court was without subject matter jurisdiction in this diversity case....Assuming without deciding that the issue so tardily raised in these proceedings is properly before the court, it nevertheless appears...." (emphasis added).

No citation of authority is necessary for the point that every court, the Court of Appeals not excepted, has the solemn imperative duty to ascertain that it has jurisdiction before it proceeds to decide a case. The Court of Appeals' rendering of a decision in the instant case "without deciding" whether the issue of subject matter jurisdiction was "properly before" it was such a departure from accepted judicial standards as to constitute an abuse of the judicial power vested in it!

Said solemn imperative duty neglected by the Court of Appeals in the instant case in proceeding "without deciding" the issue of subject matter jurisdiction arises from the nature of judicial power and the sacred trust it imposes. So grave is the obligation that this court has characterized it as a "rule"[2] which is "inflexible and without exception" Mansfield, Coldwater & Lake Michigan Railway Co. v Swan 111 US 379; 45 SCt. 510; 28 LEd 412.

How can this court tolerate such insolent flaunting of the law on the part of one of its inferior courts refusing to perform a grave and mandatory duty form-

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[2]Petitioner believes this court should restate the requirement as a "duty" rather than a "rule". Courts, like others, tend to think that "rules" are made to be broken and dislike having a "duty" imposed upon them. Be it a "rule", the Court of Appeals in the instant case broke it; be it a "duty", the Court of Appeals violated it!

ally enjoined upon it by law? It is difficult to imagine greater discredit upon the federal judiciary than a Court of Appeals deciding a case without jurisdiction, as in the instant case, while refusing to decide whether it was authorized to make the very decision made!

QUESTION II

The very "stuffing"of the instant case is "state litigation"; it is strictly a state court case; the state courts have exclusive jurisdiction thereof.

The federal courts obtained the instant case by an illegal "case-grabbing" extension of diversity jurisdiction. Justice Frankfurter was as a prophet in respect to the instant case when he warned of the "depreciation of the quality of the federal judiciary" from the evil of un-

warranted extension of diversity jurisdiction. (See his concurring 8 page opinion in Lumberman's Cas Co. v Elbert 348 US 48 78 S Ct151; 99 L Ed 89.)

What Justice Frankfurter had to say of diversity jurisdiction is as applicable to the instant case as it is to the cases of which he spoke:

1. continuance of diversity jurisdiction is "unjustifiable"

2. diversity jurisdiction inflicts upon the federal judiciary system a "mounting mischief"

3. "The stuff of diversity jurisdiction is state litigation";

4. the out-state corporation gained an "advantage against the local citizen"

5. effect of diversity jurisdiction is "discrimination against citizens of the State in favor of litigants from without the State"

6. corporate litigation is the vehicle of the "modern manifestation of these evils"

7. "corporations began their transforming influence on American life"

8. "little excuse is left for diversity jurisdiction"

9. "not founded in reason"

10. "offers constant temptation to new abuses"

11. This case is an instance in which out-of-state citizens gain a discriminatory advantage by "going to a federal court for the adjudication of state created rights"

12. diversity jurisdiction increases federal judges which is "bound to depreciate the quality of the federal judiciary and thereby adversely to affect the whole system."

13. diversity jurisdiction necessarily involves "inflation of the number of the district judges" and a resulting "depreciation of the judicial currency and the constant impairment of the prestige and efficacy of the federal courts"

14. Can it be fairly said that state tribunals are not sufficiently established on a "good footing"?

How the Circuit Court misconstrued

said Section 1332 in order to justify its illegal "case-grabbing" extension of diversity jurisdiction in the instant case is shown herein, infra, in argument section entitled "QUESTION VII".

The Circuit Court's misconstruction of said Section 1332 is its own wrong which by no means excuses the prior wrong of defendant insurer in filing a fraudulent removal petition ousting the federal courts of jurisdiction in the instant case as shown herein, infra, in argument section entitled "QUESTION III".

QUESTION III

The removal petition was fraudulent and, ipso facto, ousted the federal courts of any and all jurisdiction in the instant case. In its removal petition said insurer falsified its citizenship saying that it was "not a citizen of the State

of Michigan" well knowing that it is "a citizen of the State (Michigan) in which the insured is a citizen" by force and effect of the very law it abused in attempting to impose a non-existent jurisdiction upon the federal courts.

The ex parte removal petition in the instant case was executed by a person having no official position whatsoever in insurer's business (not even a mere employee thereof much less an officer). As an absolute minimum one or more officers of said insurer possessed of nothing less than complete and full knowledge of all of the facts would be expected to execute the removal petition.

It does not affirmatively appear from the removal petition where the "principal place of business" of defendant insurer is; for all that appears the "principal place of business" could be

in Michigan which would unquestionably defeat diversity jurisdiction. The removal petition as to this critical jurisdictional averment merely says "...with its principal office and place of business in the City of Omaha, State of Nebraska." It does NOT say "its principal place of business" is in Nebraska (emphasis supplied). In fact it is not in Nebraska as shown below!

Even assuming, arguendo, that this defect can be ignored by a federal court depending for jurisdiction upon a valid and sufficient removal petition, nevertheless the person having no official position with insured as an officer or employee who executed said removal petition contradicted an officer of said insurer in respect to the same vital jurisdictional averment.

An officer of said insurer averred

that:

> insurer's "executive offices are located in the City of Omaha, State of Nebraska" (emphasis added; pg. 37a of Joint Appendix filed in the Court of Appeals).

Said person having no official position with insurer as an officer or employee averred that:

> insurer's "place of business" (assuming, arguendo, that he meant "principal place of business") is "in the City of Omaha, State of Nebraska."(emphasis supplied).

N.B. !!!!!!

No facts,as distinct from mere legal coclusions,are alleged in the removal petition showing where insurer's "principal place of business" is; just a bare ipse dixit that it is in Nebraska which is patently wrong! Rather, it is in one of the more populous states, such as New York or California or maybe Michigan where the principal business is conducted in collecting the principal premium dollars!

It does not affirmatively appear from the removal petition that said person having no official position with insurer as an officer or employee was

possessed of full knowledge of the facts and apparently he wasn't or he would not have made the fatal mistakes he did in not identifying or misidentifying insurer's "principal place of business". This non-identifying or misidentifying of insurer's "principal place of business" in the removal petition is fatal to jurisdiction. All critical jurisdictional averments must affirmatively appear on the record. The Court of Appeals on its own motion was required to deny its own jurisdiction! Mansfield, Coldwater & Lake Michigan Railway Co. v Swan, supra. The phrase "its principal place of business" in said Section 1332 should be construed to mean "a principal place of business" as discussed, infra, in argument section entitled "QUESTION VII". In this way, any state in which a corporation is present and amenable to state

court process would be a "State" where it has a "principal place of business". This would eliminate from ex parte removal petitions the vagaries and uncertainties involved in the abstruse concept of a single "principal place of business".

Said removal petition was not accompanied by a valid bond as required by 28 USC 1446(d) in that: (a) the alleged bond lacked a duly executed power of attorney running to the attorney in fact of defendant insurer; (b) such power of attorney, even if supplied, would be invalid since said attorney in fact is ineligible by being the attorney at law in the case; and (c) the alleged bond is legally insufficient in that it is limited to an amount obviously incapable of paying "all costs and disbursements in-

curred by reason of the removal proceedings" as required by said Section 1446(d). Said amount is $500.00 which doesn't begin to cover the filing fees and printing costs in the Court of Appeals let alone this court!

QUESTION IV

The federal courts lacked subject matter jurisdiction since in the minds of respondent judges the minimum jurisdictional amount in controversy (over $10,000.00) had not been shown with any legal certainty.

Candor and probity on the part of respondent judges demand the truth that they decided a case below the $10,000.00 jurisdictional minimum as they had no intention of even considering any elements of damage except the judgment reddered against the insured ($1635.00) and possibly the costs of defense ($3380.96).

The respondent judges would hold that any other elements were not "within the contemplation of the parties". Nunez v Confederation Life Ins. Co. DC Puerto Rico 1973 372 F Supp 497. The following headnote, with slight editing, can be the organ of the Supreme Court in the case at bar:

> "Federal Court lacked jurisdiction of suit in which insured brought action against insurer to recover proceeds of policy in sum of $3000.00 and additional $10,000.00 damages sustained by reason of failure of insurer to pay."
> Nunez v Confederation Life Ins. Co., supra.

QUESTION V

Before plaintiff could act in the instant case in the state court (such as moving to add, as a party to the litigation, the judgment creditor involved in the instant case), defendant insurer fraudulently removed the same to a federal court and there had it summarily

thrown out by Federal District Judge Pratt, one of the respondent judges. The respondent judges failed to consider a question which was imperative upon them to consider, to wit: the effect their decision would have upon the judgment creditor involved in the instant case who is not a party. His judgment against plaintiff's decedent has been rendered null and void insofar as concerns his right to collect the same from defendant insurer.

The Federal District Court was without jurisdiction to determine the issue of the insurer's liability to pay said judgment since third party Kolar is not a party thereto, but nevertheless bound thereby; this is the force and effect of the following authority: All State Ins. Co. v Employer's Liability Assurance Corp. DC Fla 1970 316 F Supp 1216; reversed on other grounds 445 F2d 1278.

Said judgment creditor (third party Kolar in the instant case) is an indispensible party to the subject litigation since there is no way that a final judgment can be rendered therein without directly affecting his interests in the judgment he recovered (either adversely as with the present decision or favorably if the present decision is reversed).

In such case, the Court of Appeals was required:

> "...of its own motion, to deny its own jurisdiction and, in the exercise of its appellate power, that of all other courts of the United States in all cases where such jurisdiction does not affirmatively appear on the record on which, in the exercise of that power, it is called to act." Mansfield, Coldwater & Lake Michigan Railway Co. v Swan, supra.

Since an indispensible party was not on the record, the proper course for the District Court and the Court of Appeals was to "refuse to proceed". Williams v

Bankhead 19 Wall 563 (US 1873); Shields v Burrow 17 How 130 (US 1855).

A sua sponte dismissal is in order even though the litigants failed to raise any issue as to indispensible parties. Florida Land Rock Phosphate Co. v Anderson 50 Fl 501; 39 So 392; Hartley v Lungkamp 243 Pa 550; 90 Atl 402.

QUESTION VI

If this court ignores the action of respondent judges contemning the law by their refusal to decide the issue of subject matter jurisdiction, it would place its seal of approval upon judicial anarchy as well as add its own scorn of the law. When a federal appellate court refuses to decide whether it has authority to judge, but nevertheless judges, a new low in judicial disorder is "disachieved". At stake is the integrity of

the judicial power of the United States; an utmost conscientious sacred trust!

Here we have a U.S. Court of Appeals on record as having committed an act of the grossest tyranny, to wit: proceeding to decision "without deciding" the issue of subject matter jurisdiction . There is no principle of law under which their actions can be sustained; they are coram non judice and void. By their refusal to decide the issue of subject matter jurisdiction, respondent judges have made of themselves, in legal effect, a de facto court in the instant case which, together with their judgment, is a nullity as demonstrated in Norton v Shelby County 118 US 425; 30 L Ed 178; 6 S Ct 1121.

QUESTION VII

The principal case relied upon by the respondent judges (White v U.S.F. and G. 356 F2d 746) is fourteen years old,

was one of the earliest cases construing Section 1332 and itself admitted that it was a case of "first impression". Moreover, the White court believed the action was not a "direct action" on behalf of a judgment creditor of the insured but rather a declaratory judgment action in which the White court doubted the very existence of the relationship of "insurer" and "insured", saying "the whole substantive issue is whether, at the date of the accident, she was insured and Fidelity was her insurer". Even the White case should be put in a graveyard.

In any event, the instant case is clearly distinguished from the White case in that it is a "direct action" on behalf of a judgment creditor of the insured (said Richard Kolar, judgment creditor claimant, in the probate estate of Therese Fisher, deceased -- see foot-

note 1, pg.5, supra) in which the relationship of "insurer" and "insured" is undisputed (an alleged exclusion clause in the policy being in contention).

The other cases cited by the respondent judges were District Court cases involving not "direct actions" nor even policies of "liability insurance" but what the respective courts characterized as U-M (uninsured motorist) coverages.

In its decision in the instant case the Court of Appeals has improperly added a requirement to said Section 1332 manifestly contrary to its very terms, to wit: that "law suits" (to be beyond diversity jurisdiction) must be "brought by a third party". Witness the Court of Appeals' legislatively unauthorized statement in this regard:

> "28 USC 1332(c) was clearly designed by Congress to remove from diversity jurisdiction

> those law suits brought by a third party directly against the insurance company where diversity would not otherwise lie against the insured" (emphasis added).

In its decision in the instant case the Court of Appeals said:

> "In his petition for rehearing, plaintiff has cited no authority for his position in addition to the statute because there is none."

This is not true as shown by the following extract from plaintiff's supplement to his petition for rehearing: "In Walker v Firemen's Fund Ins. Co. DC Mont 1966 260 F Supp 95, it was held that where the cause of action urged against the insurer is of such a nature that liability could be imposed against the insured, the action is a "direct action". A fortiorari is the action a "direct action" where the liability has already been imposed against the insured and the

cause of action urged against the insurer is one to collect the judgment on behalf of the injured or damaged party.

By necessary implication of the following authority, diversity is precluded under said Sec. 1332 where, as in the case at bar, suit, at least in part, is brought against insurer as "payor of a judgment based upon the negligence of one of its insureds": Velez v Crown Life Ins. Co. CA Puerto Rico 1979, 599 F2d 471."

Actually no authority "in addition to the statute" is necessary to perceive the manifest error in the Court of Appeals' decision extending diversity jurisdiction to cases where Congress intended to restrict it by the proviso in said Section 1332.

The Court of Appeals decision in the instant case is contrary to at least the

following other U.S. Court of Appeals decisions:

Williams v Liberty Mutual Ins. Co. 468 F2d 1207

Hernandez v Travelers Ins. Co. 489 F2d 721

O.M. Greene Livestock Co. v Azalea Meats Inc. 516 F2d 509

Campbell v INA 552 F2d 604

The Court of Appeal's decision in the instant case is contrary to the reasoning and precedent of this court in Lumberman's Casualty Co. v Elbert 348 US 48; 78 S Ct 151; 99 L Ed 59, particularly Justice Felix Frankfurter's 8 page concurring opinion.

The Court of Appeals decision in the instant case is contrary to an act of Congress, to wit: the clear wording of Section 1332 which makes defendant insurer a citizen of Michigan in the instant case. This court should set the Sixth Circuit straight and put a screeching halt to its

senseless "case grabbing" extension of diversity jurisdiction. The Sixth Circuit can't get away from going to its old stale file cards and resurrecting the should be graveyarded White case. See Henderson v Selective Ins. Co. 369 F2d 143 which relied upon White. How many erroneous lower court cases the Sixth Circuit spawned is anyone's imagination! See Carvin v Standard Acc. Ins. Co. 253 F Supp 232 which relied upon White. The Fifth Circuit has given said Section 1332 "the broad interpretation it deserves in light of the harm (congestion in the Federal Courts) Congress sought to remedy". O.M. Greene Livestock Co. v Azalea Meats Inc., supra.

The various Circuits need the clarification of this court as to how said Section 1332 should be read.

In the Torres case (Torres v Hartford

Ins. Co. 588 F2d 848) the First Circuit admitted that its reading of said Section 1332 "has not been as restrictive of jurisdiction as that of the Fifth Circuit"[4]. Nonetheless, its said "reading" has been

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[4]The Fifth, of all Circuits, is probably the closest but is still off target. This court should re-examine Lumberman's Gas Co. v Elbert, supra, and dispense with legal fictions. Subsection (a) of said Section 1332 would then have no application to cprporations by dint of reasoning in Paul v Virginia 8 Wall 168 (US 1869) and subsection (c) would be disregarded as surplusage or contradictory to subsection (a). Another solution is to read "principal place of business" as too involved a concept (requiring consideration of too many extraneous matters) to be resolved on an ex parte affidavit. Witness the instant case where a non officer of the foreign insurer (a person wholly unconnected with said insurer except for being on legal retainer) executes an ex parte affidavit failing to identify or misidentifying insurer's "principal place of business". The concept is much simplified if, as previously suggested (see argument section, supra, entitled "QUESTION III"), "its principal place of business" is read as "a principal place of business". Then any place is "principal" where the corporation is doing business sufficient to be amenable to state court process. Still

more enlightened than that of the illegal archaic illogic of the Sixth Circuit!

This state of things amounting to legal anarchy where said Section 1332 is putty in the hands of the various Circuits meaning, not what it says, but what they want it to say at the time and different things in different parts of the country has been going on for sixteen years. The "mounting mischief" of which Justice Frankfurter warned is epitomized in the instant case where a federal court,

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[4](cont'd.)
another solution (but less restrictive of diversity jurisdiction than the foregoing suggested solutions) is for this court to expansively read "any direct action" to mean any action in which an insurer can be made a defendant directly irrespective of whether the insured is plaintiff and any "liability" insurance to mean any contract or policy on which the insurer is liable. This business of restricting the meaning of "direct action" to those brought by "third parties" as promoted and promulgated by the Court of Appeals in the instant case is too unreal to be believable.

proceeding wholly without warrant and "without deciding" the issue of subject matter jurisdiction, purports to answer in a state court case in which the state court has exclusive jurisdiction strictly state court questions in manifest contradiction to most strong state public policy by overreaching its jurisdictional bounds by an unlawful "case-grabbing" extension of diversity jurisdiction.

This court should settle the question of the proper construction of said Section 1332 with a view to restricting this unlawful extension of diversity jurisdiction knowing that the federal courts have problems enough with their own dockets let alone pumping out injustice (witness the instant case) in cases of strictly state court litigation.

QUESTION VIII

The following extract from plaintiff's brief before the Court of Appeals amply demonstrates that respondent judges decided an important state question in such manifest disregard of state law as to require reversal of their judgment.

"The lower court judge appeared to be so taken up with the "in charge of" exclusion in the policy and its so-called "clarity", that he overlooked, not only its true meaning (property other than an automobile) so that it is not even applicable to the facts in the case at bar, but also its intrinsic nature which makes it contrary to both positive law and public policy in Michigan. The following is extracted from plaintiff's brief accompanying his motion for partial summary judgment in the court below:

> "Plaintiff's daughter was a permissive user of the automobile she

was driving; any exception to liability that the defendant insurer can concoct is void as matter of brick wall policy so notorious that defendant's refusal to defend said daughter and pay the judgment against her constitutes bad faith dealing as a matter of law." Celina Mutual Ins. Co. v Preferred Risk Mutual Ins. Co. 51 Mich App 99; Lilje et al v Univ. Underwriters ins. Co. 54 Mich App 378; Citizens Mutual Ins. Co. v Central Nat'l Ins. Co. of Omaha 65 Mich App 349; DAIIE v Van Slyke 82 Mich App 237.

The foregoing says all that needs to be said about automobile liability policies in Michigan and Michigan law which mandates insurance coverage for "any person who is using the insured vehicle with the owner's consent against damage from the use". Lilje et al v Univ. Underwriters Ins. Co., supra. Why the lower court judge ignored such strong positive law and policy is not known nor understood!

It is unfortunate indeed that the lower court judge made the improper ruling that he did as it is bound to have an ad-

verse effect upon the remaining issue to be tried to a jury, to wit: plaintiff's damages for defendant insurer's bad faith dealing and wrongful refusal to defend. The lower court judge should have known that the alleged "in charge of" exclusion could not possibly be relied upon to justify denying liability and insurance coverage to the insured daughter. The law of Michigan and the strong public policy thereof based upon such law is too clear and cogent to admit of or permit the alleged "in charge of" exclusion relied upon by the defendant insurer in this case.

In commenting upon the applicable Michigan statute (MCLA 500.3009; MSA 24.13009) the Michigan Court of Appeals said:

> "The statute provides for only <u>one</u> exclusion, clearly inapplicable here. The exclusion contained in the policy before this Court is not authorized by the statute." <u>DAIIE</u> v <u>Van Slyke</u> 82 Mich App 237.

Likewise, in the case at bar the alleged "in charge of" exclusion is not authorized by Michigan law; being therefore void it need not be further considered by the Court of Appeals in this case; likewise Argument Sections II and III herein following need not be considered by the Court of Appeals. Reversal and remand are in order; upon remand the Court of Appeals should see to it that this case is reassigned to another lower court judge since the present one has prejudiced plaintiff's cause of action by his expressed attitude, in the face of such manifest insurer's liability, that: 'I don't think the insurer here could be liable under the facts presented to the Court'".

Another affirmation disregarded by respondent judges of the strong public policy of the state of Michigan voiding the alleged exclusion which the defendant

insurer used to cheat plaintiff in the instant case is Community Service Ins. Co. v Shears 89 Mich App 372; 280 NW2d 532 where the Michigan Court of Appeals spoke as follows of all exclusions to public liability in Michigan, save one[5] (not applicable in the case at bar):

> "The exclusionary clause in question is invalid. It is neither authorized by statute (MCL 500.3009; MSA 24.13009) nor in harmony with the legislative purpose as interpreted by the judiciary."

This court should save the federal judiciary from the horrendous mistake into which respondent judges have plunged it in

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[5] The one and only exclusion to an insurer's liability permitted by said unvarying strong brick wall public policy as enunciated by both statute and court decisions in Michigan is that which is incorporated into the declaration pages of the policy and to which the insured agrees ahead of time (concerning a named person as operator of a motor vehicle).

allowing a liability insurer to escape statutorily imposed obligations under its liability policy contrary to Michigan's unvarying strong brick wall public policy voiding all exclusions to liability save one.[5]

QUESTION IX

The other state court questions raised in plaintiff's Brief before the Court of Appeals were also erroneously decided by respondent judges including the question (if remaining) of the ambiguity of the alleged exclusion, the question of insurer's duty to defend and the question of insurer's obligation to pay medical benefits.

The final resolution of the propriety of these decisions can await additional briefs when and if the cause is set down for argument.

QUESTION X

Defendant insurer knew that the exclusion contained in its insurance policy was void under Michigan law and its use by insurer to cheat plaintiff out of what is justly due him constitutes a common law cheat by false pretenses.

Defendant insurer's false garnishment disclosure hiding the very issuance of its insurance policy and its subsequent actions in the federal courts commencing with the fraudulent removal petition it filed should close the door to it of all judicial relief.

> "The place of justice is a hallowed place; and therefore not only the Bench, but the foot pace and precincts and purprise thereof ought to be preserved without scandal and corruption." Ancient precedent

The following extract from plaintiff's

brief before the Court of Appeals amply demonstrates insurer's still further cheating in the instant case.

"Defendant insurer deliberately falsifies by saying: "Its policy (meaning defendant insurer's policy) contains no limitation respecting public liability because public liability is the coverage that Plaintiff purchased". What audacity! To first attempt to push down the insured's throat the alleged "in charge of" exclusion in Part I of the policy entitled "LIABILITY", then to fool the lower court judge with its legalese concerning the same and now to tell the Court of Appeals that the "in charge of" exclusion is not contained in its policy is such dishonest forked tongued talk on the part of defendant insurer as to deserve the strong-

est censure of the Court of Appeals![6] How can plaintiff-appellant be expected to meet such deceitful double talk? Defendant insurer now says that the very bone of contention between it and its insured, to wit: the "in charge of" exclusion (which contravenes public policy) is not contained in its policy! How defendant insurer can now say "its policy contains no limitation respecting public liability..." when the

---

[6] Such dishonest conduct on the part of defendant-insurer, coupled with its previous wrongdoing of filing a false garnishment disclosure hiding issuance of its liability policy and falsely stating that "it was not and is not presently indebted to defendant Therese Fisher, nor to William L. Fisher, nor to Richard Kolar in any amount whatsoever", is such iniquity as should close the door to it to all judicial relief. In Precision Co. v Automotive Co. 324 US 806 the U.S. Supreme Court said that no "mere banality" is involved in the maxim that it applied against the offending party therein, to wit: that "closes the doors of a court...to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief".

"in charge of" exclusion is contained in Part I of its policy entitled "LIABILITY" is incomprehensible![7] Defendant insurer should be made to suffer the consequences of its admission that: "Its policy contains no limitation respecting public liability.." by sue sponte reversal. In a very real sense its said admission is true that: "Its policy contains no limitation (which Michigan law recognizes as valid) respecting

---

[7] Defendant insurer's deceit doesn't stop with just the foregoing falsifying but it continues its deceit by saying: "had he done so (i.e. purchase collision coverage), Part III of the policy would also be applicable and the occurrence would have been covered". Defendant insurer well knows that it is impossible for its said statement to be true as the plaintiff father's collision coverage (if he had purchased the same) would not extend to third party Kolar's automobile in respect to which plaintiff father and his daughter have no insurable interest. For the defendant insurer and even the lower court to be concerned as to whether plaintiff had collision coverage or not is manifestly immaterial, irrelevant and impertinent to the question of plaintiff's daughter's "liability imposed by law" to third party Kolar to pay the judgment he obtained against her!

public liability...". Insofar as plaintiff's daughter is concerned, third party Kolar's claim and judgment against her unquestionably constitutes a "loss from the liability imposed by law..." Plaintiff's family automobile policy was delivered to him in Michigan by defendant insurer and certified by the latter as proof of financial responsibility under Michigan's financial responsibility act. Therefore said policy must comply with statutory requirements. Exclusions that cause a certified policy to deviate from statutory requirements are barred. As said in DAIIE v Van Slyke, supra: "The statute provides for only one exclusion, clearly inapplicable here" (at page 241)."

CONCLUSION

The duty of the Supreme Court in this case is clear! Nevertheless, in this case plaintiff adopts and concludes with the plea of Daniel Webster on behalf of his client in the Dartmouth College case:

> "Every other protection for my material possessions, every other means of comfort, counsel and assistance, all my legal rights have collapsed. Who else can I call upon? Who do I beseech? Whom can I implore? Unless it is in this place, unless it is from and through you Magistrates, that I obtain protection for my rights which now hang by a slender thread...."

Wherefore the writ, as hereinabove prayed for, should issue.

Respectfully submitted,

WILLIAM L. FISHER, Esq.
Attorney at Law
Petitioner, in pro per
1051 Naughton St. #202
Troy, Michigan 48084
(313) 689-8550

APPENDIX

Item I - Copy of Order of the Court of Appeals denying rehearing en banc.

79-1046

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

WILLIAM L. FISHER, individually and as administrator of the Estate of Therese deL. Fisher, deceased,

Plaintiff-Appellant,

v

OMAHA INDEMNITY COMPANY,

Defendant-Appellee.

ORDER

Before: ENGEL and Keith, Circuit Judges and BALLANTINE, District Judge*

Plaintiff's petition for rehearing en banc has been referred by the Chief Judge to the original hearing panel, no judge in active service of the court having requested a vote for rehearing en banc.

In his petition, the plaintiff asserts for the first time that the district

court was without subject matter jurisdiction in this diversity case because it is a "direct action against the insurer of a policy of contract of liability insurance ...to which action the insured is not joined as a party defendant." Therefore, in such case the defendant insurance company is made a statutory citizen of Michigan by virtue of 28 USC 1332(c). Assuming without deciding that the issue so tardily raised in these proceedings is properly before the court, it nonetheless appears that it is entirely without merit. 28 USC 1332(c) was clearly designed by Congress to remove from diversity jurisdiction those law suits brought by a third party directly against the insurance company where diversity would not otherwise lie against the insured.

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*Hon. Thomas A. Ballantine, Judge, United States District Court for the Western District of Kentucky, sitting by designation.

In his petition for rehearing, plaintiff has cited no authority for his position in addition to the statute because there is none. Where the issue has arisen. the cited statute has consistently been held not to bar a diversity action between the insured under an insurance policy and his insurer. White v United States Fidelity & Guaranty Co., 356 F2d 746 (1st Cir. 1966); Irvin v Allstate Insurance Co., 436 F Supp 575 (W.D. OKL 1977); Adams v State Farm Mutual Automobile Ins. Co., 313 F Supp 1349 (N.D. Miss. 1970); Inman v MFA Mutual Insurance Co., 264 F Supp 727 (E.D. Ark. 1967). Accordingly,

IT IS ORDERED that the petition for rehearing is denied.

ENTERED BY ORDER OF THE COURT

JOHN A. HEHMAN
Clerk

****

Item II - Copy of order of the Court of Appeals affirming the lower court.

79-1046

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

WILLIAM L. FISHER, individually and as administrator of the Estate of Therese deL. Fisher, deceased,

Plaintiff-Appellant,

v

OMAHA INDEMNITY COMPANY,

Defendant-Appellee.

ORDER

Before: ENGEL and KEITH, Circuit Judges and BALLANTINE, District Judge*

This matter is on appeal from a summary judgment entered in favor of the defendant in the plaintiff's action, originally filed in the Oakland County, Michigan, Circuit Court and removed by the defendant insurance company to the United States District Court for the Eastern District of Michigan. Plaintiff's complaint sought to recover from Omaha Indemnity

Company certain sums which individual plaintiff William L. Fisher had incurred individually and as administrator of the estate of his deceased daughter Therese deL. Fisher. The monies sought included the amount of a judgment entered against his daughter for liability in an automobile accident which occurred on March 20, 1973, the cost of defense of that litigation, medical expenses incurred on account of her injuries in that accident, and punitive damages claimed because of the insurance company's failure to honor its obligations under the contract of insurance.

A review of the entire record convinces us, as it did the district judge, that the insurance policy as a matter of Michigan law did not cover the damages to the vehicle in question nor require the insurer to defend the claims for damages not covered by the policy.

We further note that the insurer, prior to the institution of the litigation, had fully honored its obligation to pay for medical expenses which were incurred on behalf of the decedent for the twelve-month period ending March 20, 1974, and it had no obligation to honor any expenses beyond those already paid for in that one-year period. While Michigan law requires the policy of insurance to be construed most favorably to the insured, there were, contrary to the assertion of the appellants, no ambiguities in the policy which sould affect the construction of its plain language. In addition, because the insurer's denial of further coverage was proper under the terms of the policy, there could be no claim for punitive damages. Accordingly,

IT IS ORDERED that the judgment of the district court be and it is hereby

affirmed.

ENTERED BY ORDER OF THE COURT

JOHN A. HEHMAN
Clerk

ISSUED AS MANDATE: OCTOBER 22, 1980
COSTS: NONE

A TRUE COPY

Attest:
JOHN P. HEHMAN, Clerk

By Audrey Crockett
Deputy Clerk

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*Hon. Thomas A. Ballantine, Judge, United States District Court for the Western District of Kentucky, sitting by designation.

****

Item III - Copy of transcript in the lower court containing its decision.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

WILLIAM L. FISHER, individually and as Administrator of the Estate of THERESE deL. FISHER, deceased,

No. 8-71629

Plaintiff,

v

OMAHA INDEMNITY COMPANY, a foreign insurer,

Defendant.

Excerpt from proceedings had in the

above-entitled matter before the HONORABLE PHILIP PRATT, United States District Judge, at Detroit, Michigan, September 25, 1978.

RULING OF THE COURT

APPEARANCES:

WILLIAM L. FISHER
Plaintiff in pro per
1051 Naughton St. #202
Troy, Michigan 48084

ARTHUR M. HOFFEINS
3553 City National Bldg.
Detroit, Michigan 48226
Appearing on behalf of the
Defendant

Roy Luxton
Court Reporter

Detroit, Michigan
September 25, 1978

THE COURT: The plaintiff here has filed a motion for partial summary judgment on two of the counts and issues in this case.

It appears that the plaintiff had a home policy, which is frequently called a "family" policy. The policy excluded any

collision provision. It did contain an liability provision with certain exceptions. The policy also provided for payment of medical expenses incurred within one year of the date of the accident.

It appears from the facts here, taken as true for the pruposes of this motion, the late Miss Fisher borrowed an automobile from Mr. Kolar, and while she was driving that automobile had an accident which caused her physical injury and, in addition, which caused damage to the automobile itself.

Subsequently, Mr. Kolar instituted suit for the property damage sustained as a result of the accident to that automobile. Miss Fisher had substantial medical expenses which extended well beyond a period of one year from the date of the accident.

The plaintiff has instituted this

suit, so far as the issues before the Court are concerned, to recover up to $5,000.00, some amount having been paid already, for medical expenses, and also to recover the amount of property damage, including the cost of the defense to the suit for property damage.

Although the plaintiff here makes some ingenuous arguments and interpretations, I think that they are strained and do not pass the test of reasonableness. I think the language of the policy is clear and cases interpreting that language also make it very evident that the plaintiff may not succeed on his motion for summary judgment.

In the first instance, with regard to the property damage, as I indicated, there was no collision provision, there was liability for property damage, but the exception provision includes an ex-

ception for an insured, under the policy, who has "charge of" the property. I don't think that there is any real debate or issue as to what that term means or what it signifies.

One of the insureds here had posession and control of that property --who was the driver, as a matter of fact-- and certainly that would come within the "in charge" and exception provision.

That being the case, I don't think that the insurer here could be liable under the facts as presented to the Court.

With regard to the medical expenses, the language again is clear, "expenses incurred within a year of the date of the accident." It does not refer to the injuries that may have been sustained nor does it extend the time merely because the insured has medical expenses after a year.

I think, again, that is very plain, simple language, and that binds this Court to a determination that the motion for summary judgment must be denied.

MR. HOFFEINS: Thank you, your Honor. I have a proposed order here that I will submit to Mr. Fisher.

MR. FISHER: Your Honor, in view of your Honor's ruling, I would like to strike out the word "partial" and make it for summary judgment, because there is no sense in going on with my damage claim, in view of your ruling. So, I might as well just appeal this and -- in other words, there is no sense in me going on with a claim for bad-faith treatment when you say it is so clear in your mind. Why fool around? Let's cross out "partial" and let me appeal and that will conclude the case.

MR. HOFFEINS: Your Honor, it is a motion

for partial summary. That is exactly the way I have it phrased in my order.

THE COURT: One at a time, gentlemen.

MR. HOFFEINS: I'm sorry.

THE COURT: So we can get this on the record.

Counsel, I have this problem: How can you appeal the denial of a motion for summary judgment?

MR. FISHER: Well, just cross out "partial" and make it final.

THE COURT: No; answer this question: How can you appeal a motion for summary judgment? Your case is still alive.

MR. FISHER: There is no issue left, is there?

THE COURT: I don't know whether there is or not. You brought a motion for summary judgment.

MR. FISHER: Yes.

THE COURT: Your case is still alive. I

merely denied your motion.

What do you have to appeal?

MR. FISHER: Pardon?

THE COURT: What do you have to appeal?

MR. FISHER: I am asking you to cross out "partial summary" from this order, and make it appear as "final".

THE COURT: Counsel, you are not listening to me.

MR. FISHER: Why can't you make it final?

THE COURT: Excuse me, Counsel.

MR. FISHER: All right.

THE COURT: You filed a motion for summary judgment.

MR. FISHER: Partial summary; thinking that I had a cause of action remaining if the Court was of the opinion that I am of the opinion of, that they had bad-faith treated and they had no reasonably basis.

Now, you have said in your ruling here that it is very clear and there isn't

even any room for another interpretation. And if that is the case, I have no claim left for bad-faith treatment and, therefore, you might as well make it a final judgment and sign the order as final judgment and cross out "partial judgment", and then that ends the case. And if I prevail on the appeal and have you overruled, then we come back for determination of bad-faith treatment, your Honor. We might as well make it final.

MR. HOFFEINS: I think I can resolve it for Mr. Fisher. I am going to bring a motion for summary judgment. I should have, but I didn't actually have the time. That was my next act. Then he can appeal that if he wants to.

THE COURT: Yes.

MR. HOFFEINS: I will bring a motion for summary, Mr. Fisher, then it is a final order for you. You see, this isn't.

MR. FISHER: Well, I am saying we might as well save the time of everybody and make it a final motion today.

THE COURT: Do you want to make an oral motion for summary judgment, Counsel?

MR. HOFFEINS: Yes, I do, on the same basis as set forth in my brief in response to Mr. Fisher's motion.

THE COURT: Mr. Fisher, will you waive the presentation of a written motion?

MR. FISHER: Yes.

THE COURT: And may I now consider this as sort of cross-motions for summary judgment?

MR. FISHER: For final summary, yes.

MR. HOFFEINS: Yes.

THE COURT: Very well, then, I will grant the defendant's motion for summary judgment.

MR. FISHER: Can we, then, cross out "partial"?

THE COURT: No; you will have to prepare

it so it shows that I granted a motion for summary judgment.

MR. HOFFEINS: I will prepare one and send it to you, Mr. Fisher.

MR. FISHER: All right.

MR. HOFFEINS: Thank you, your Honor.

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Item IV - Copy of Michigan Statute
MCL 500.3009; MSA 24.13009

An automobile liability or motor vehicle liability policy insuring against loss resulting from liability imposed by law for property damage, bodily injury or death suffered by any persons arising out of the ownership, maintenance or use of a motor vehicle shall not be delivered or issued for delivery in this state with respect to any motor vehicle registered or principally garaged in this state unless such liability coverage as is provided therein is subject to a limit, exclusive of interest and costs, of not less

than $20,000.00 because of bodily injury to or death of 1 person in any one accident and, subject to said limit for 1 person, to a limit of not less than $40,000.00 because of bodily injury to or death of 2 or more persons in any one accident, and to a limit of not less than $10,000.00 because of injury to or destruction of property of others in any accident.

****

Item V - Copy of Federal Statute
28 USC 1332

§ 1332. Diversity of citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—

(1) citizens of different States;

(2) citizens of a State and citizens or subjects of a foreign state;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

(c) For the purposes of this section and section 1441 of this title, a corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business: *Provided further*, That in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business.

(d) The word "States", as used in this section, includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico.

As amended July 26, 1956, c. 740, 70 Stat. 658; July 25, 1958, Pub.L. 85–554, § 2, 72 Stat. 415; Aug. 14, 1964, Pub.L. 88–439, § 1, 78 Stat. 445; Oct. 21, 1976, Pub.L. 94–583, § 3, 90 Stat. 2891.

****

Item VI - Copy of Federal Statute
28 USC 1446(d)

§ 1446. Procedure for removal

(d) Each petition for removal of a civil action or proceeding, except a petition in behalf of the United States, shall be accompanied by a bond with good and sufficient surety conditioned that the defendant or defendants will pay all costs and disbursements incurred by reason of the removal proceedings should it be determined that the case was not removable or was improperly removed.

Item VII - Copy of Defendant Insurer's fraudulent Removal Petition

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

WILLIAM L. FISHER, individually and as Administrator of the Estate of THERESE deL. FISHER, deceased,

No.871629

Plaintiff,

v

OMAHA INDEMNITY COMPANY, a foreign insurer,

Defendant.

Arthur M. Hoffeins (P-15030)
Attorney for Defendant

PETITION FOR REMOVAL

NOW COMES Omaha Indemnity Company, (hereinafter referred to as "Petitioner"), by Arthur M. Hoffeins, its attorney, and petitions for removal of the above entitled cause from the Circuit Court of the County of Oakland, State of Michigan, in which Court said case is now pending, to the United States District Court for the

Eastern District of Michigan, Southern Division.

IN SUPPORT THEREOF, Petitioner respectfully shows as follows:

1. On January 4, 1978, an action was commenced against Petitioner in the Circuit Court for the County of Oakland, State of Michigan, entitled William L. Fisher, individually and as Administrator of the Estate of Therese deL. Fisher, Deceased, Plaintiff vs. Omaha Indemnity Company, a foreign insurer, Defendant, and service was made upon Petitioner through the Michigan Insurance Commission on June 21, 1978, of a Summons and Complaint, copies of which are collectively attached hereto and marked Exhibit "A" and made a part hereof by reference.

2. The aforesaid documents constitute all process, pleadings, and orders served upon Petitioner in such action.

3. Such action is one of which this Court has original jurisdiction under the provisions of Title 28, United States Code Section 1332, and is one which may be removed to this Court by Petitioner, Defendant herein, pursuant to the provisions of Title 28, United States Code, Section 1441, in that it is an action of a civil nature, wherein Plaintiff herein seeks judgment against Defendant in an amount in excess of the sum of Ten Thousand Dollars, exclusive of interest and costs, and is between citizens of different states, as more fully shown below:

a. At the time such action was instituted in the Circuit Court for the County of Oakland, State of Michigan, Plaintiff William L. Fisher was and is a resident and citizen of the State of Michigan, as Petitioner is informed and

believes.

b. At the time such action was commenced, and at the present time, Petitioner is an insurance corporation organized and existing under the laws of the State of Wisconsin, with its principal office and place of business in the City of Omaha, State of Nebraska, and was not and is not a citizen of the State of Michigan, where such action was brought.

4. Petitioner files herewith a bond with good and sufficient surety, conditioned as provided by Title 28, United States Code, Section 1446(d), that it will pay all costs and disbursements incurred by reason of these proceedings should it be determined that this action is not removable or was improperly removed.

WHEREFORE, Petitioner prays for

removal from the Circuit Court of the County of Oakland, State of Michigan, to this Court.

Arthur M. Hoffeins
ARTHUR M. HOFFEINS
Attorney for Petitioner
3553 City National Bldg.
Detroit, Michigan 48226
962-6630
State Bar No. : P-15030

DATED: July 3, 1978

****

Item VIII - Copy of Defendant Insurer's Invalid Bond for Removal

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

WILLIAM L. FISHER, individually and as Administrator of the Estate of THERESE deL. FISHER, deceased,

No.871629

Plaintiff,

v

OMAHA INDEMNITY COMPANY, a foreign insurer,

Defendant.

Arthur M. Hoffeins (P-15030)
Attorney for Defendant

BOND FOR REMOVAL

KNOW ALL MEN BY THESE PRESENTS that we, Omaha Indemnity Company, a Wisconsin corporation, and Fidelity & Deposit Company of Maryland, a Maryland corporation, are held and firmly bound unto William L. Fisher, individually and as Administrator of the Estate of Therese deL. Fisher, Deceased, Plaintiff in the above-entitled cause, and his executors, administrators, heirs and assigns, as the case may be, in the full sum of Five Hundred and 00/100ths ($500.00) Dollars, lawful money of the United States of America, for the payment of which, well and truly to be made, we, and each of us, bind ourselves, our successors and assigns, as the case may be, jointly and severally by these presents.

WHEREAS, Omaha Indemnity Company has petitioned the United States District

Court for the Eastern District of Michigan, Southern Division, for the removal to said Court of an action now pending in the Circuit Court for the County of Oakland, State of Michigan, wherein William L. Fisher, individually and as Administrator of the Estate of Therese deL. Fisher, Deceased is Plaintiff and Omaha Indemnity Company is Defendant.

NOW, THEREFORE, the condition of the above obligation is such that if Omaha Indemnity Company shall pay all the costs and disbursements incurred by reason of said removal proceedings, should it be determined that the said action was not removable or was improperly removed, then this obligation shall be null and void; otherwise, it shall remain in full force and effect.

IN WITNESS WHEREOF, we have set our hands and seals this 3rd day of July,

1978.

OMAHA INDEMNITY COMPANY

BY: hand, Arthur M. Hoffeins
Arthur M. Hoffeins,
Attorney in fact

FIDELITY & DEPOSIT COMPANY
OF MARYLAND

BY: hand, Wesley R. Henrikson
Wesley R. Henrikson,
Attorney in fact

JAN 16 1981

IN THE SUPREME COURT OF THE UNITED STATES

WILLIAM L. FISHER, individually and as Administrator of the Estate of Therese de L. Fisher, Deceased,
Petitioner,

-vs-

OMAHA INDEMNITY COMPANY, a foreign insurer,
Respondent.

No. 80-1044

RESPONSE TO PETITION FOR EXTRAORDINARY WRIT

Arthur M. Hoffeins (P-15030)
Attorney for Respondent
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AMERICAN PRINTING COMPANY
1200 WEST FORT STREET, DETROIT, MICHIGAN 48226 — (313) 963-9310

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RESPONSE TO PETITION FOR EXTRAORDINARY WRIT

Respondent, Omaha Indemnity Company, respectfully prays that Petitioner's Petition for Extraordinary Writ be denied.

QUESTION PRESENTED

Did the Federal Court have jurisdiction to hear this action?

STATEMENT OF THE CASE

Respondent issued to Petitioner its Family Automobile Policy providing (PART I) coverage, as applied for by Petitioner, for public liability but not collision insurance, which would have been covered under PART III thereof.

> The policy contained the following exclusion under PART I (i):
>
> "This policy does not apply under Part I:
>
> "(i) to injury to or destruction of (1) property owned or transported by the insured or (2) property rented to or in charge of the insured . . ."

Additionally, the policy also agreed to pay medical expenses up to a maximum amount of $5,000.00 in PART II C as follows: "To pay all reasonable expenses incurred within one year from the date of the accident for necessary medical, surgical, x-ray and dental services, including prosthetic devices, and necessary ambulance, hospital, professional nursing and funeral services." This benefit applied to the named insured and each relative sustaining bodily injury while occupying an owned automobile or a non-owned automobile operated with the consent of the owner.

On March 20, 1973, Therese de L. Fisher, the daughter of the Petitioner insured, William L. Fisher, borrowed an

automobile from one Richard Kolar, apparently an automobile dealer, and as a result of her negligence damaged the automobile by overturning it. Richard Kolar sued her and obtained a judgment in the amount of $1,635.00 against her for the damage to the automobile.

Petitioner submitted various medical bills to Respondent for the twelve-month period ending March 20, 1974, for medical expenses incurred by Therese de L. Fisher, totaling $1,172.65, all of which it paid. It refused to pay any medical expenses incurred after March 20, 1974 because of the twelve-month medical limitation period regarding medical expenses quoted above.

Respondent refused to pay the judgment obtained by Richard Kolar or any other sums because it maintains that the provisions of the policy quoted above exlude coverage respecting the use by Therese de L. Fisher of the Kolar automobile.

Petitioner instituted garnishment proceedings against Respondent in the Michigan District Court, which proceedings were quashed by the Court because there was no basis for the issuance of a writ of garnishment. Thereafter, Petitioner instituted the instant action in the Oakland County Circuit Court for the State of Michigan, which was removed by Respondent to the Federal District Court on the basis of diversity of citizenship. The Federal District Court granted summary judgment in favor of Respondent. This judgment was affirmed by the Federal Court of Appeals (Appendix A).

Petitioner never challenged the removal of the action by Respondent until after the Court of Appeals affirmed the judgment of the Federal District Court. His subsequent petition for rehearing based on jurisdictional grounds was denied by the Court of Appeals (Appendix B).

ARGUMENT

THE FEDERAL COURT HAD JURISDICTION TO HEAR THE INSTANT ACTION.

Petitioner's petition is predicated on the theory that under 28 U.S.C. Sec. 1332(c) his initial action in the state court was a "direct action against the insurer of a policy or contract of liability insurance . . . to which action the insured is not joined as a party defendant", and that consequently by virtue of that section Respondent is made a statutory citizen of the State of Michigan.

A review of the fact situation in the instant case shows very clearly that it does not come within the intendment of the above statutory section. That section was, as the Court of Appeals stated in its order denying rehearing (Appendix B), "clearly designed by Congress to remove from diversity jurisdiction those lawsuits brought by a third party directly against the insurance company where diversity would not otherwise lie against the insured." The instant action does not come within the meaning of that section. It is an action by the insured against his own insurance company, a foreign insurer whose principal office and principal place of business is in the State of Nebraska.

That 28 U.S.C. Sec. 1332(c) is not intended to apply to a fact situation where, as here, an insured is suing his own insurer, not somebody else's insurer, is borne out by the case of *Irvin* v. *Allstate Insurance Co.*, 437 F. Supp. 575 (1977), also cited by the Court of Appeals in its order denying rehearing, where the Court sets forth the rationale behind the adoption by Congress of that particular section (pp. 576-577):

> "The proviso of the above section was added in 1964. The legislative history of the 1964 amendment to Sec. 1332(c) discussed in *White* v. *United States Fidelity and Guaranty Co.*, 356 F.2d 746 (1. Cir. 1966), makes it clear that the words 'direct action' were used to refer to statutes such as those in

Louisiana and Wisconsin which allow a party injured by the negligence of an insured to pursue his right of action against the insurer alone. Therefore, the primary purpose of Sec. 1332(c) would seem to have been to remedy the overcrowding of the dockets of the federal courts in Louisiana and Wisconsin caused by the fact that citizens of those states injured by the negligence of their fellow citizens covered by liability insurance policies by foreign insurers could litigate or be compelled by removal to litigate in the federal courts claims that ordinarily would have been litigated in the local state courts. *Lassiter* v. *State Farm Mutual Automobile Insurance Co.*, 371 F.Supp. 1221 (E.D. Ark. 1974).

"(3) Courts which have construed Sec. 1332(c) have uniformly held that Congress intended the word 'direct' to limit the word 'action' so that its impact is narrowed to those situations in which an injured party is permitted to sue, directly and without joinder of the tortfeasor, the tortfeasor's liability insurer without first obtaining a judgment against the tortfeasor himself. *Lank* v. *Federal Insurance Co.*, 309 F.Supp. 349 (D. Del. 1970); see *White* v. *United States Fidelity and Guaranty Co., supra; Walker* v. *Firemans Fund Insurance Co.*, 260 F.Supp. 95 (D. Mont. 1966); *Carvin* v. *Standard Accident Insurance Co.*, 253 F.Supp. 232 (E.D. Tenn. 1966), *aff'd*, 395 F.2d 326 (6 Cir. 1968). Accordingly, actions by an insured against his own insurer under the uninsured motorist provisions of the policy have been held not to constitute direct action within the proviso of Sec. 1332(c). *Adams* v. *State Farm Mutual Automobile Insurance Co.*, 313 F.Supp. 1349 (N.D. Miss. 1970); *Bishop* v. *Allstate Insurance Co.*, 313 F.Supp. 875 (W.D. Ark. 1970); *Inman* v. *MFA Mutual Insurance Co.*, 264 F.Supp. 727 (E.D. Ark. 1967)."

From the foregoing, it is clear that the Federal District Court had subject matter jurisdiction in this diversity case.

CONCLUSION

WHEREFORE, Respondent prays that Petitioner's Petition for Extraordinary Writ be denied.

Respectfully submitted,

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DATED: December 31, 1980

APPENDIX A

No. 79-1046

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

WILLIAM L. FISHER, individually and as administrator of the Estate of Therese de L. Fisher, deceased,
Plaintiff-Appellant

v.

OMAHA INDEMNITY COMPANY,
Defendant-Appellee

Before: ENGEL and KEITH, Circuit Judges and BALLANTINE, District Judge*

This matter is on appeal from a summary judgment entered in favor of the defendant in the plaintiff's action, originally filed in the Oakland County, Michigan, Circuit Court and removed by the defendant insurance company to the United States District Court for the Eastern District of Michigan. Plaintiff's complaint sought to recover from Omaha Indemnity Company certain sums which individual plaintiff William L. Fisher had incurred individually and as administrator of the estate of his deceased daughter Therese de L. Fisher. The monies sought included the amount of a judgment entered against his daughter for liability in an automobile accident which occurred on March 20, 1973, the cost of defense of that litigation, medical expenses incurred on account of her injuries in that accident, and punitive damages claimed because of the insurance company's failure to honor its obligations under the contract of insurance.

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* Hon. Thomas A. Ballantine, Judge, United States District Court for the Western District of Kentucky, sitting by designation.

A review of the entire record convinces us, as it did the district judge, that the insurance policy as a matter of Michigan law did not cover the damages to the vehicle in question nor require the insurer to defend the claims for damages not covered by the policy.

We further note that the insurer, prior to the institution of the litigation, had fully honored its obligation to pay for medical expenses which were incurred on behalf of the decedent for the twelve-month period ending March 20, 1974, and it had no obligation to honor any expenses beyond those already paid for in that one-year period. While Michigan law requires the policy of insurance to be construed most favorably to the insured, there were, contrary to the assertion of the appellants, no ambiguities in the policy which would affect the construction of its plain language. In addition, because the insurer's denial of further coverage was proper under the terms of the policy, there could be no claim for punitive damages. Accordingly,

IT IS ORDERED that the judgment of the district court be and it is hereby affirmed.

Entered by the Order of the Court,

JOHN P. HEHMAN, *Clerk*

APPENDIX B

ORDER

Before: ENGEL and KEITH, Circuit Judges and BALLANTINE, District Judge*

Plaintiff's petition for rehearing en banc has been referred by the Chief Judge to the original hearing panel, no judge in active service of the court having requested a vote for rehearing en banc.

In his petition, the plaintiff asserts for the first time that the district court was without subject matter jurisdiction in this diversity case because it is a "direct action against the insurer of a policy or contract of liability insurance . . . to which action the insured is not joined as a party defendant." Therefore, in such case the defendant insurance company is made a statutory citizen of Michigan by virtue of 28 U.S.C. §1332(c). Assuming without deciding that the issue so tardily raised in these proceedings is properly before the court, it nonetheless appears that it is entirely without merit. 28 U.S.C. §1332(c) was clearly designed by Congress to remove from diversity jurisdiction those law suits brought by a third party directly against the insurance company where diversity would not otherwise lie against the insured.

In his petition for rehearing, plaintiff has cited no authority for his position in addition to the statute because there is none. Where the issue has arisen, the cited statute has consistently been held not to bar a diversity action between the insured under an insurance policy and his insurer. *White* v. *United States Fidelity & Guaranty Co.*, 356 F.2d 746 (1st Cir. 1966); *Irvin* v. *Allstate Insurance Co.*, 436 F.Supp. 575 (W.D. Okl. 1977); *Adams* v. *State Farm Mutual Automobile Ins. Co.*, 313 F. Supp. 1349 (N.D. Miss.

* Hon. Thomas A. Ballantine, Judge, United States District Court for the Western District of Kentucky, sitting by designation.

1970); *Inman* v. *MFA Mutual Insurance Co.*, 264 F. Supp. 727 (E.D. Ark. 1967). Accordingly,

IT IS ORDERED that the petition for rehearing is denied.

Entered by the Order of the Court,

JOHN P. HEHMAN, *Clerk*

No. 80-1044

IN THE SUPREME COURT OF THE
UNITED STATES

1980-81 Term

In re WILLIAM L. FISHER,
individually, and as
administrator of the
estate of Therese deL.
Fisher, deceased, etc.

On Writ, alternatively, of Prohibition,
Mandamus, Superintending Control or
Common Law Certiorari to the United
States Court of Appeals for the Sixth
Circuit

PETITIONER'S REPLY

TO INSURER'S RESPONSE

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PETITIONER'S REPLY TO INSURER'S RESPONSE

Now comes petitioner and, in reply to insurer's response, shows unto the Supreme Court as follows:

Said response[1] is predicated upon a supposed showing of jurisdiction in the

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[1]The Rules of the Supreme Court of the United States pertaining to procedure on certiorari say:

> "The order may be a summary disposition on the merits." Rule 23.1

Petitioner doesn't know how this could be possible because issues on the merits haven't been presented as yet via facts, questions presented and briefs.

Insurer's response presents a "Statement of the Case" as though the merits were being decided. Its allusion to Petitioner's lack of "collision" coverage is a deliberate dodge or cover-up because it knows its insured (Petitioner) could never purchase "collision" coverage for a non-owned vehicle belonging to a third party.

Insurer is dishonest to the U.S. Supreme Court in citing an alleged exclusion to public liability coverage because it: (1) contravenes the law and public policy of Michigan; and (2) pertains to "property" other than an automobile and is therefore inapplicable.

On the merits, insurer will be found by the U.S. Supreme Court to be a cheat which was aided and abetted in its cheating by the lower federal courts.

lower federal courts. Insurer assures the Supreme Court of such jurisdiction without disclosing that the Sixth Circuit refused to decide such issue.

The only comment insurer makes about the Court of Appeals' decision on rehearing is on page 2 of its response (last three lines) which, when corrected, reads:

> "His (Petitioner's) subsequent petition for rehearing en banc based on jurisdictional grounds was denied by the Court of Appeals without deciding such grounds." (Emphasis supplied).

Insurer's assurance to the Supreme Court of jurisdiction in the lower federal courts is both a bit ludicrous considering that they themselves (the lower federal courts) give no such assurance and much like the insurance it sells -- untrustworthy. Insurer harps an old tune found in some of the lower federal courts' singsongs about said Section 1332, to

wit: that its purpose is limited to correcting overcrowding of the federal courts in Louisiana and Wisconsin only.

The fourteen year old should-be-graveyarded White case and cases spawned thereby are relied upon by insurer to thus abnormally limit the proper scope and beneficial effect of said Section 1332.

The Supreme Court should use the instant case to give the proper intrepretation of said Section 1332 and put to rest for good all pro-diversity thinking in the federal courts.

Even the Supreme Court has not been as anti-diversity in its thinking as said Section 1332 warrants so that it is little wonder that there is so much pro-diversity thinking in the lower federal courts.

For example, while this court (majority opinion, that is) was "right on" in

Owen Equipment & Erection Co. v Kroger 434 US 1008, its pro-diversity thinking in Provident Tradesmen Bank & Trust Co. v Patterson 390 US 102 caused it to overlook the fact that a sham device was employed to "create" a fake diversity, to wit: purposeful omission of the automobile owner (whether a dispensible or indispensible party) as a defendant to fabricate a paper diversity case.

Pro-diversity reasoning in Thermtron Products v Hermansdorfer 423 US 336[2] prevented the three dissenters views from carrying the day. Even the latter failed to argue that removal of a state court matter to an overcrowded federal

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[2]In this case petitioner's counterpart sought an extraordinary writ in the Sixth Circuit but not in the Supreme Court; yet the latter issued the same. Petitioner submits that, if this court believes he should have sought a statutory certiorari, the same should issue in the same manner, i.e. without discussion and with alacrity.

court can indeed be considered "improvident" within the meaning of Section 1447(c).

In the instant case, the Supreme Court should take jurisdiction not only to right the horrendous wrong done petitioner by the lower federal courts in refusing to decide subject matter jurisdiction and ignoring, inter alia, strong public policy of Michigan, whereby to let insurer escape statutorily imposed obligations, but also to place such construction upon said Section 1332 as proposed in footnote 4 (page 34) of petitioner's petition, whereby to eliminate corporations entirely from its operation or to read it such that any corporate place of business is "principal" if the corporation is established sufficiently to be amenable to state court process. At least it should decide whether the instant removal petition is insufficient as petitioner claims, if not fraudulent, in view of the

clear words of said Section 1332 making insurer a citizen of Michigan in this case.[3]

In the instant case petitioner has amply demonstrated a clear and indisputable

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[3]Surely the court noted insurer's attempted upgrading of the bare ipse dixit it used in its removal petition to supposedly confer jurisdiction upon the federal courts.

The bare ipse dixit in its response (page 3 lines 18 and 19) reads:

> "...whose principal office and principal place of business is in the State of Nebraska." (emphasis supplied).

The bare ipse dixit in its removal petition (page 23a of petitioner's petition) reads:

> "...with its principal office and place of business in the City of Omaha, State of Nebraska..."

This bare ipse dixit made by one having no official position with insurer and without stating operative facts is a far more deficient removal petition than the one in Maryland v Soper (No. 1) 270 US 9 held "not sufficiently informing and specific to make a case for removal". In respect to the cited case, petitioner queries this court whether Justice Taft's recommendation of "more liberal use of mandamus" should not be applied to civil cases now when the quality of justice dispensed in the federal courts has reached a crisis from overcrowding.

right to the extraordinary writ prayed for though he has not specified the form it should take. Petitioner submits that it could well be prohibition to prohibit the wrongful assumption of jurisdiction by the lower federal courts or common law certiorari to bring up the whole record and dispose of the case on its merits based upon the original jurisdiction of the state court of first instance. It matters little as to the form of the writ[4] as long as it is equal to its great remedial task of preventing the grave miscarriage of justice in the instant case of the lower federal courts' "refusing to decide" the issue of subject matter jurisdiction while denying petitioner, inter alia, his damages for insurer's wrongful refusal to defend.

Petitioner is entitled to a jury

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[4] Ex parte Simon 247 US 231

trial on this issue. Deprivation of a jury trial was the basis for a mandamus from this court in Ex parte Simons, supra. The latter pales in comparison to the hurt done petitioner in the instant case. The order in Ex parte Simons, supra, was interlocutory while in the instant case it is final and entered without jurisdiction. The summary judgment against petitioner of two successive federal courts does more than deprive him of a jury trial on the issue of insurer's bad faith conduct toward its insured; it finally and forever dissolves a state court judgment against plaintiff's decedent and bars his right as administrator of the estate of plaintiff's decedent to collect said judgment filed as a claim against said estate.

If the Supreme Court not intervene to give righteous judgment in the instant case how else will be upheld the credit

of the federal judiciary?

WHEREFORE, the extraordinary writ prayed for in petitioner's petition should issue.

Respectfully submitted,

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